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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, Secretary of Defense of the United States, *et al.*,

Petitioners,

vs.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as Next Friend of FRANZ SIEBERT, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AN *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,

NANETTE DEMBITZ,
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Attorneys for Movant.

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The American Civil Liberties Union respectfully applies to this Court for leave to file a brief as an *amicus curiae* in the above entitled action, and submits that it satisfies the requirements respecting eligibility for such leave provided in amended paragraph 9 of Rule 27 of this Court's Rules, on the following grounds:

1. Respondents have consented to the applicant's filing of a brief *amicus*. The Solicitor General, however, on behalf of petitioners has refused consent, stating that because of the amendment to this Court's Rule respecting *amicus* briefs, he deems it desirable generally to leave to

this Court the determination of whether or not to accept briefs *amicus*, but stating that he will not oppose the instant application for permission to file.

2. The question presented by the above entitled action is whether the courts of the United States have jurisdiction to issue a writ of habeas corpus on the petition of alien enemies convicted by a United States military tribunal for violation of the laws of war but confined outside the territorial limits of the United States, in a prison operated by the United States Army in the American zone of occupation of Germany.

3. Interest of American Civil Liberties Union

(a) The American Civil Liberties Union is a nonpartisan nationwide organization maintained for the purpose of furthering and effectuating the Constitutional guarantees as to personal and political liberties; one of its major and traditional methods for advancing this objective is participation as an *amicus curiae* in litigation involving civil liberties issues.

(b) The American Civil Liberties Union's program emphasizes the advancement of American efforts to stimulate democratic practices on the part of other governments, and in particular, in the countries defeated in World War II in which the United States exercises temporary sovereignty as an occupant: the Union has concerned itself with this aspect of international policy because of American responsibility to the peoples of other nations attendant on the United States' position of leadership, as well as because of the repercussions of the forms of government in other countries upon those here. Democratic conduct of United States officials with respect to personal free-

dom and the administration of justice is, in the view of the American Civil Liberties Union, of special importance in dealing with the people of the occupied areas, in view of the special obligation to such people arising from our assumption of occupancy. The Union holds that the conduct of United States officials in relation to such people must accord with democratic principles in order to help establish democratic patterns in such countries, to exemplify the operation of democratic processes, and to demonstrate the sincerity of United States' declarations of the worth of democratic institutions.

In recent years the American Civil Liberties Union has devoted a major part of its activities to the promotion of these views, having maintained since 1948 a Committee on the Occupied Territories, and since 1945 a Committee on International Civil Liberties.

(c) The American Civil Liberties Union has a keen interest in the instant case because (1) of its concern with the general availability of habeas corpus as a means of protecting personal liberty; (2) if jurisdiction to issue the writ is not asserted in the face of allegations of a substantial nature in respondents' petition that their detention violates the Constitution and laws of the United States, the result will be a judicial failure to implement and effectuate Constitutional and statutory safeguards; (3) if jurisdiction to issue the writ is denied on the basis that the Constitution and laws of the United States do not apply with respect to respondents' detention, the result will permit of arbitrary denial of personal freedom by United States officials outside the United States; (4) a failure to establish jurisdiction to issue the writ will result in irreviewable military discretion and, *pro tanto*, the supremacy of military over civil power in dealing with individual liberty; (5) if the writ is held to be unavailable to re-

spondents, the United States will be withholding from people over whom it exercises power outside its borders, the protection it enforces within. Thus the case has unusual significance from the standpoint of exemplifying democratic practice to the peoples of other countries, particularly of occupied areas, and of establishing the means for correcting arbitrary deprivations of personal freedom by United States officials outside our borders; further, the decision herein is important as a matter of principle and precedent from the standpoint of the effectuation of civil liberties in the United States. Thus, the instant case has an important bearing on the objectives and program of the movant.

4. Reasons for submission of brief

Petitioners' brief has not yet been filed, and respondents' brief consequently is not yet in final form. Movant's counsel has, however, spent a substantial amount of time, approximately sixty hours, in studying all available documents in the instant case as well as relevant authorities. On the basis of such study, and of conversations between its and respondents' counsel, the movant has reason to believe that some questions of law of relevance to the issues herein will not be fully covered in respondents' brief.

Movant believes that in addition to precedents and history as to habeas corpus jurisdiction which respondents intend to argue, the following broader questions, which respondents' counsel has stated he does not presently intend to brief extensively, if at all, are relevant: the operation of the Constitution outside the borders of the United States; the correlation between the existence of a Constitutional restriction and the availability of a remedy to insure its application; Constitutional restrictions on the power of the President as Commander-in-

Chief; and the powers of the United States as an occupant. These questions, while broad, have direct and important bearing on the issue presented by the instant case. The opinion of the Court of Appeals herein is largely based on its view of the first two questions mentioned; and this Court has indicated in its opinion in *Ahrens* v. *Clark*, 335 U. S. 192, that policy considerations and the effect of various possible interpretations of the statute providing for habeas corpus jurisdiction are of the utmost significance in determining its construction.

It has not been feasible to present the instant motion at an earlier date due to the necessity for first determining respondents' proposed argument.

It is respectfully requested on the above grounds that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION.

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March 16, 1950.